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Mubita Mwananuka v Armaguard Security CAZ Appeal No. 201/ 2021

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Facts

The Court of Appeal, in the case of *Mubita Mwananuka v Armaguard Security CAZ Appeal No. 201/2021*, delivered a Ruling on 3rd August 2022 to divest the High Court General List of jurisdiction over employment matters. I argue that this decision is in clear violation of the Constitution and demonstrates bewildering disregard of precedents by the Supreme Court and the Constitutional Court, which bind the Court of Appeal.

The case was an appeal from the High Court decision. The appellant had commenced action in the High Court General List from his former employers housing allowance arrears, statutory retirement benefits, leave days and interest on the claimed amounts. The High Court dismissed the matter on a preliminary issue, based on the judge's reading of section 85 of the Industrial and Labour Relations Act, section 3 of the Employment Code Act and article 133 of the Constitution, and held: 'It is quite evident from the same constitutional provisions and legislation that the Plaintiff's action ought to have been launched in the Industrial and Labour Relations Division and not the General Division or List.' On appeal, the Court of Appeal upheld the lower Court's decision. Shockingly, for a court of the stature of the Court of Appeal, it never backed its position by any legal analysis, and chose to simply assert: 'The purpose for which the HC-IRD [High Court-Industrial Relations Division] was established is crystal clear and to allow the haphazard filing of claims will interfere with the smooth administration of justice.'

Significance

There is no legal basis for this assertion by the Court of Appeal. Article 133(2) establishes the Industrial Relations Court, as one of the divisions of the High Court. There are, however, two provisions that speak to the jurisdiction of the High Court. The two differ in nature and essence. The first is article 134(a), which states: 'The High Court has, subject to Article 128— (a) unlimited and original jurisdiction in civil and criminal matters.' This is a 'conferment' clause. It confers or vests civil and criminal jurisdiction in the 'High Court' as a single unified entity. This entails that each judge of the High Court, regardless of the division he/she may be assigned, embodies this global civil and criminal jurisdiction that vests in the High Court. Each High Court Division and each High Court judge is by virtue of article 134(a) clothed with the plenitude of the civil and criminal jurisdiction that vests in the High Court as a whole. To hold otherwise, as did the Court of Appeal, is to render this provision ornamental and a futile provision. This is at the heart of constitutional democracy. An individual or entity can only exercise power conferred by law. The jurisdictional power of the High Court is given in article 134(a).

The second provision relevant to understanding the jurisdiction of the High Court is article 120(3)(b), stating: "The following matters shall be prescribed: (b) jurisdiction, powers and sittings, of the Industrial Relations Court, Commercial Court, Family Court, Children's Court and other specialised courts." This is technically an 'empowering' clause. An empowering clause simply allows the provision of subsidiary means of carrying out what is already conferred in the concerned legislation. This entails that what is provided for in a subsidiary law premised on an empowering clause cannot circumvent the rights and duties that already vest because of the conferment clause (in this case article 134(a)). It goes without saying that since article 134(a) vests global jurisdiction in civil and criminal matters in the High Court, no

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law enacted pursuant to article 120(3)(b) can take away that jurisdiction. This forbids stonewalled compartmentalization of jurisdiction of the divisions of the High Court.

There is a lot of comparative jurisprudence supporting this approach. In the case of *Adriaan Bezuidenhout v The Road Accident Fund Case No. 355/2002[2003],* the South African Supreme Court of Appeal cited with approval the assertion of the scholar Bennion in relation to the exercise of power under an empowering clause of legislation: 'The delegate is not intended to travel wider than the object of the legislature. The delegate's function is to serve and promote that object, while always remaining true to it.' The Same approach was preferred by the South African Constitutional Court in the case of Ministry of *Finance v Afribusiness NPC [2022] ZACC4* when it noted that 'the functionary entrusted with the regulation making power cannot stray from the parameters set by the empowering legislation.' It is, however, the old Australian case of *Shanaban v Scott 1957 96 CLR 245* that forcefully and elegantly drives the point home: 'The result is to show that such a power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends.'

The second and very basic issue is that the decision of the Court of Appeal violates the doctrine of precedent. The Court of Appeal is inferior to both the Supreme Court and the Constitutional Court. The decisions of these two courts bind the Court of Appeal. It cannot just wish away the decisions of these two courts which it does not like. Cases raising similar matters have been to these two Courts and decisions at variance with the Court of Appeal decision were made. The Court of Appeal, as an inferior Court, was duty bound to heed those precedents. In the case of *Zambia National Commercial Bank PLC v Martin Musonda and 58 Others Selected Judgment No. 24 of 2018* the Constitutional Court dealt with the implication on the operations of the Industrial Relations Court of the constitutional establishment of the Industrial Relations Court division of the High Court. It cautiously held:

> The Applicant's argument that matters before the Industrial Relations Court Division should be commenced in accordance with the High Court Rules, as the Industrial Relations Court is now a division of the High Court is untenable as it is at variance with Article 120 (3) (a) and (b) of the Constitution as amended. In its literal interpretation, Article 133 (2) of the Constitution as amended merely makes the Industrial Relations Court a division of the High Court and has not affected wholesale, the provisions of the Industrial and Labour Relations Act and its Rules to the extent that they do not conflict with any provision of the Constitution as amended. Until new legislation is enacted to provide for the processes and procedures and jurisdiction of the Industrial Relations Court Division pursuant to Article 120 (3) (a) and (b) of the Constitution as amended, the Court continues to use the existing processes and procedures and enjoys the same jurisdiction.

The Supreme Court in *Cosmas Mukuka (Suing in His Capacity as Secretary General of Zambia Congress of Trade Unions) v Jason Mwanza (Suing in His Capacity as General Secretary of the University of Zambia Lecturers and Researchers Union Selected Judgment No. 13 of 2019* took the same cautious and non-disruptive approach.

Considering the importance of the subject matter and the enormity of the consequences that would flow from its decision, it is hard to understand why the Court of Appeal decided to take

a casual, simplistic, and ill-researched position, uninformed by any critical engagement of the text of the Constitution, key precedents and academic literature on the subject matter. Such bad decisions are not only bad for immediate litigants but are bad for similarly situated litigants, future litigants, the public and needlessly make the teaching of law in universities challenging.[2]

[2] About two weeks following the initial publication of this article, the Court of Appeal reversed itself thereby reinstating the status quo.